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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 296

GENEVIEVE JOHNSON,

Petitioner,

vs.

ELEANOR MUELBERGER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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SUPREME COURT OF THE UNITED STATES

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No. 296

GENEVIEVE JOHNSON,

Petitioner,

against

ELEANOR MUELBERGER,

Respondent

RE: ESTATE OF E. BRUCE JOHNSON

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Genevieve Johnson, respectfully prays for the issuance of a Writ of Certiorari to review the judgment below.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257(3). The judgment of the New York Court of Appeals was entered April 14, 1950 (R. 51). An order of this Court extending the time to file a petition for a writ of certiorari was granted by

Mr. Justice Burton on July 7, 1950, extending such time up to and including September 9, 1950 (R. 53).

Opinions Below

The opinion of the Surrogates Court is unreported but may be found at R. 39. The memorandum opinion of the Appellate Division may be found in the record at p. 44 and is reported in 275 Appel. Div. 848. The opinion of the Court of Appeals appears in the record at p. 45 and is reported in 301 N. Y. 13 and 92 N. E. (2) 44.

Questions Presented

1. Respondent, the daughter of decedent E. Bruce Johnson by marriage No. 1 [1] and sole legatee under his Will, contested in the New York Surrogate's court petitioner's election to take her widow's portion (as wife No. 3) on the ground that decedent's Florida divorce from wife No. 2, in which husband and wife both appeared, was invalid. The court below, reversing the Surrogate and the Appellate Division, held the Florida divorce invalid on the ground that the proceedings before the Surrogate showed no affirmative evidence that the wife had resided ninety days in Florida as required by Florida law, prior to instituting her divorce suit. Hence the court below held the third marriage was void.

As under *Coe* v. *Coe*, 334 U. S. 378 the father could not assail the Florida decree, the question is presented whether the court below has not violated the Full and Credit Clause of the Federal Constitution and 28 U.S.C. 1738 by permitting the daughter to do so after his death. After all, the father's right to will his daughter property is subject to the widow's claim resulting from a marriage he cannot under *Coe* v. *Coe, supra*, assail.

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[1] The first wife died and decedent married Madoline Ham, wife No. 2.

Statement

The petitioner, Genevieve Johnson, married the decedent, E. Bruce Johnson, on the 19th day of February, 1944, at Great Neck, New York (R. 22). The decedent died June 29, 1945 (R. 23), leaving a Last Will and Testament dated April 21, 1943, which was duly admitted to Probate in the Surrogates Court of Nassau County on August 27th, 1945, Eric Muelberger, Jr., being appointed executor (R. 4). By the terms of the Will the decedent bequeathed his entire estate to the respondent, Eleanor Muelberger (R. 4).

Following Probate proceedings the Petitioner, Genevieve Johnson, his widow, filed a notice pursuant to Section 18 of the Decedent's Estate Law of the State of New York declaring her election, as widow, to take against decedent's Will her intestate share of his estate (R. 4). Thereupon the respondent, Eleanor Muelberger, instituted a proceeding under Section 145a of the Surrogates Court Act of the State of New York to obtain a determination of the validity of such election (R. 3).

The respondent, Eleanor Muelberger, is the wife of the executor, Eric Muelberger, and is a daughter of the decedent by his first marriage (R. 29, 45). After the death of his first wife, the decedent in 1939 married Madoline Ham, from whom he was divorced in 1942 by a Florida Decree (R. 12, 40).

In such divorce action instituted by the second wife, Madoline Ham Johnson, the decedent appeared by Attorney and interposed an answer denying the wrongful acts, but not questioning the allegations as to her residence in Florida. Testimony was taken by the Florida Court and the divorce granted Madoline Ham Johnson (R. 12, 39).

The respondent, Eleanor Muelberger, claimed below that the petitioner, Genevieve Johnson, the widow of the decedent could not be his lawful widow due the fact that the

divorce obtained by Madoline Ham Johnson, the second wife, was invalid because of failure to comply with residential requirements and that the same was obtained in the State of Florida by sham and fraud (R. 5). The evidence adduced upon the trial in the Surrogates Court of Nassau County with reference to the disputed divorce discloses that prior to the divorce both husband and wife resided in Garden City, New York until sometime before Thanksgiving of 1941 (R. 36) at which time Madoline Ham Johnson left her husband and went to Florida, where she instituted an action for divorce against her husband in November 1941, in which the decedent appeared and did not contest the jurisdiction. This action was discontinued and dismissed in February 1942 (R. 26, 46). Afterwards, Madoline Ham Johnson returned to decedent at Garden City, New York (R. 31, 46). During the month of April, 1942, she again left the decedent and went to live in West Hemstead, New York (R. 13, 31). On or about June 7, 1942, the itinerant second wife again left New York for Pensacola, Florida, where she resided (R. 15, 21).

On July 29, 1942, Madoline Ham Johnson for the second time filed a bill of complaint against the decedent for an absolute divorce in the Court of Record in Escambia County, Florida, out of which a final decree of divorce was entered against the decedent on August 17, 1942 (R. 11, 40). This is the decree attacked by the respondent, Eleanor Muelberger, even though her father appeared in the action by a firm of attorneys and contested the major allegations of misconduct, but did not contest the jurisdiction of the Court (R. 11, 39).

After trial the Surrogates Court of Nassau County rejected the contentions of Eleanor Muelberger, the respondent, and found for the petitioner declaring her to be the widow of decedent (R. 39). The Appellate Division of the Supreme Court of the State of New York Second

Judicial Department at Brooklyn, New York, unanimously affirmed the findings of the trial court (R. 44).

However, the Court of Appeals of the State of New York reversed the findings of both lower Courts and directed judgment for respondent, Eleanor Muelberger (R. 51).

In effect the court held that while under *Davis* v. *Davis*, 305 U. S. 32, 40, *Sherrer* v. *Sherrer* and *Coe* v. *Coe*, 334 U. S. 378, 384, the *decedent*, after appearance, could not attack the Florida decree, a stranger could do so under the dictum in *Williams* v. *North Carolina*, 325 U. S. 226, 230, 232 (R. 48, 49). The court went on to hold that under Florida law (Fla. Stat. 65.02) proof of ninety days residence could not be supplied by admission of the parties and hence the Florida divorce was void.

Way in Which Federal Question Was Raised

The Full Faith and Credit clause and the Federal Statute (28 U.S.C. Sec. 1737) were asserted by petitioner's motion to dismiss filed in the trial court (R. 22). It was the basis of the ruling of the Surrogate (R. 39) and the affirmance by the Appellate Division (R. 44). It was discussed by the court below in its opinion (R. 49) and its alleged inapplicability is the obvious basis for its judgment.

Reasons for the Allowance of the Writ

The decision below seems plainly violative of this Court's holding in *Coe* v. *Coe*, 334 U. S. 378, wherein the defendant wife admitted as true the husband's allegations of Nevada residence and the Nevada Court entered a divorce decree in favor of the wife. This court held that the wife could not later attack the Nevada decree in Massachusetts because, this Court held, the decree "was entered after proceedings in which there was participation by both plaintiff and defendant and in which both parties were given full oppor-

tunities to contest the jurisdictional issues." The court below conceded that on this ground neither the decedent nor his then wife could thereafter challenge the Florida decree on jurisdictional grounds, citing *Davis* v. *Davis*, 305 U. S. 32, 40, and *Sherrer* v. *Sherrer*, 334 U. S. 343, 351. However, it seized upon this Court's dictum in *Williams* v. *North Carolina*, 325 U. S. 226, 230, that "those not parties to a litigation ought not to be foreclosed by the interested actions of others" and on this basis held that the daughter by the first marriage could attack the jurisdiction of the Florida court in order to bar the widow.

It seems clear that the court below misapplied the *Williams* case which was limited to the power of a sovereign *State* to ascertain, in a criminal trial, the evidence of a crucial jurisdictional fact in foreign divorce proceedings (*Williams*, Op. p. 230). There being no question, under *Coe* v. *Coe, supra*, of the binding effect of the Florida divorce upon decedent, the effect of the decision below is retroactively to loose the chains that bind him to the Florida decree by allowing him to make a Will barring petitioner, his present wife. It is incongruous to say that the decedent is bound by the Florida decree but that his daughter, the recipient of his munificence by Will, may ignore it and eliminate the widow whose right to her widow's portion has vested by a marriage her husband could not assail under *Coe* v. *Coe, supra*. It must be remembered that the daughter's right to contest the widow's election under Section 145a of the Surrogate's Court Act flows from her status as sole beneficiary under the Will.[2] Hence she is not,

[2] Sec. 145-a of the Surrogates Court Act provides that "any person interested in obtaining a determination as to the validity or effect of any election to take an intestate share against the provisions of a will • • • may present • • • a petition setting forth the facts which show his interest • • • and the particular question concerning which he requests the determination of the court." 13 Gilbert-Bliss Civil Practice of New York Annotated Sec. 145-a.

in any sense, a "stranger" in the sense of *Williams* v. *North Carolina*, 325 U. S. 226, 230 but can take only such property as her father possessed under the Full Faith and Credit clause as the result of the Florida divorce and his subsequent marriage.

It would seem important that this Court's holding in *Williams* v. *North Carolina*, 325 U. S. 226 at 230, should not be expanded to permit a daughter whose only right flows from her father's Will to deny the validity of a divorce decree which the father himself cannot assail in making the Will. If this is permitted, particularly after the death of the father, doubt may be cast upon a divorce when one of the parties thereto is no longer alive to testify even as to jurisdictional facts. The legitimacy of children might even be questioned.

The Federal question presented herein was properly raised below and is novel and warrants this Court's issuance of the writ.

Conclusion

It is submitted that the present petition should be granted and the judgment below reversed.

Respectfully submitted,

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